Supreme Court of Indiana.

TOLEDO, WABASH & WESTERN RAILROAD *v.* JAMES WRIGHT.

A statute providing that for non-payment of fare, a railroad company may put a passenger off the train at any usual stopping place, does not prohibit the company from putting the passenger off, for this reason, at any other place.

Where a passenger, having ample time and opportunity to ascertain by proper inquiry the regulations of the railroad company with regard to the purchase of tickets and the payment of fare on the train, fails to make such inquiry, enters a train without a ticket and then refuses to pay the increased rate charged under the company's rules to passengers not having a ticket, the conductor is justified in putting him off the train at any place not dangerous to his life or limbs.

ERROR to Huntington Circuit Court.

This was an action against a railroad for an alleged breach of its duty as a common carrier.

The complaint contained three paragraphs. In the first two, plaintiff alleged that at different times, while travelling on defendant's road, the defendant had extorted from him a greater amount than the usual rate of fare. In the third, he alleged that upon another occasion, while travelling on defendant's road, defendant forcibly, without lawful cause, and at a point other than a usual stopping place, ejected him from the car and refused to carry him further.

Defendant answered that it had established a passenger tariff-rate between its stations, and that, as an inducement to pay at the station, it discounted ten cents on every ticket purchased thereat; that it did this in order to put a check on those who handled fares on the train; that the plaintiff had tendered on the train ten cents less than the regular fare, and upon his refusing in a boisterous manner and to the disturbance of the other passengers, to pay the regular fare, the conductor stopped the train and put him out.

On the trial, the facts relied on by the plaintiff, as set forth in his own testimony, were substantially as follows: On the two occasions, mentioned in the first two paragraphs of his complaint, he paid his fare on the train and was charged ten cents more than he had ever paid before between the same stations, although he had frequently travelled by defendant's road, sometimes with and sometimes without a ticket; that on the occasion mentioned in the third paragraph of his complaint, he tendered thirty cents to the conductor, who refused it, saying that the fare was forty cents; that he reminded the conductor that he had been carried between the same

stations twice before for thirty cents; that he refused to pay forty cents, whereupon the conductor stopped the train and put him out at a place where there was no station, and which was about three and a half miles from his destination.

The court charged the jury that under sect. 28, Ind. Rev. Stat. (which provided that a conductor might, for non-payment of fare, eject a passenger "at any usual stopping place"), defendant had no right to eject plaintiff from the train for a refusal to pay his fare, except at a usual stopping place, and that if plaintiff was put off for no other reason than the non-payment of fare, he was entitled to recover.

The verdict was for plaintiff in the sum of $500. Judgment was entered thereon, and defendant appealed.

C. B. Stuart and *T. A. Stuart*, for appellant.

W. H. Trammell, for appellee.

The opinion of the court was delivered by

Howk, C. J., (after stating the facts).—Upon the case stated in the third paragraph of the complaint, and the evidence given on the trial, the court, of its own motion, gave the jury trying the cause the following instruction, to wit: "In this state the law prohibits a railroad company from ejecting a passenger from the cars, for a refusal to pay his fare, except at a usual stopping place; and if you find from the evidence that the defendant (plaintiff) was put off the train at a place remote from an usual place, for no other reason than that he refused to pay his fare, then the plaintiff is entitled to recover."

It is evident, we think, that this instruction was founded upon the court's construction of section 28 of the general law of this state, providing for the incorporation of railroad companies, approved May 11th 1852. This section reads as follows: "Sect. 28. If any passenger shall refuse to pay his fare or toll, the conductor of the train and the servants of the corporation may put him out of the cars at any usual stopping place:" 1 R. S. 1876, p. 709.

It would seem from the language used in the instruction above quoted, that the court must have construed the provisions of this section 28 of the statute, as amounting to a positive prohibition against any railroad company's right to put any passenger out of its cars, for his refusal to pay his fare, at any other place than a

usual stopping place for its cars, on the line of its road. Such a construction of the section quoted is not required by the language used therein, and is not in harmony with the general law of this state on the subject of the section; and, therefore, we are not inclined to adopt it. The section is permissive and not prohibitory in its terms. It allows a railroad company to do a given thing for a specified reason, at a certain place, but the law does not prohibit the railroad company, either in that section or elsewhere, from doing the same thing, for the same or any other valid reason, or at any other place. In the case of *The Jeffersonville Railroad Co.* v. *Rogers*, 28 Ind. 1, it was well said by FRAZIER, J.: "The passenger who refuses to pay fare is from that moment an intruder, and wrongfully on the train. He has no lawful right to be carrid *gratis* to the next station. This is too plain to admit of debate. It follows, that he may be expelled at once."

The case cited was again before this court, on a subsequent appeal, when the following language was used, in the opinion of the court by WORDEN, C. J. (38 Ind. 1): "If the expulsion had been rightful in itself, it might, perhaps, have been legally effected at any time of day or night, and at any place, without reference to stations, or the convenience and comfort of the party expelled."

The right of the railroad company to expel a passenger from its cars, for his refusal to pay fare, as a rule, at any time "and at any place without reference to stations," was not doubted or questioned by the learned judge who wrote the opinion last referred to, but in that case, it was shown that the passenger, Rogers, before entering the appellant's car, had properly applied at the ticket office for a ticket, and without fault on his part, but through the wilfulness, mistake or inadvertence of its agent, had been unable to secure such ticket, and it was very properly held, we think, on those facts, that Rogers was entitled to be carried, by his payment to the conductor of the price of the ticket, and could not be required to pay in addition to such price, the excess, which, by the rules of the company, was charged the passengers who, without an effort to purchase a ticket, paid his fare on the cars to the conductor of the train.

In the case last cited, and in the case of *The Indianapolis, &c., Railway Co.* v. *Rinard*, 46 Ind. 293, the legal right of a railroad company to discriminate between the amounts of fare, where a ticket is purchased, and where the fare is paid upon the train, and

to demand, exact and receive a larger fare, in the latter case, than the price charged for a ticket, is fully recognised by this court. In the case at bar, therefore, the appellant had the legal right to exact from the appellee for his fare between Antioch and LaGro, a larger sum of money when paid to the conductor on the train, than it would have charged him for a ticket between the same places; and when the appellee refused, as he did, to pay the fare demanded, the conductor of the train had the right, and it was his duty as a faithful servant, to put the appellee out of the cars, and off his train, at any time and at any place, on the line of the road, without reference to stations, and without actual danger to his life or person. When he refused to pay his fare, he became an intruder, a mere trespasser in the appellant's cars; and he had the rights of a trespasser and no other rights. Certainly he had no right to be carried by the appellant, without charge, to the next station.

It would seem from the record before us, that there were no intermediate stations on the appellant's road between Antioch and LaGro, only a distance of six miles intervening between said places. The appellee entered the appellant's cars at Antioch to go to LaGro, and when the conductor demanded his fare, the train was very nearly equidistant between the two places. When he refused to pay his fare, it surely was not the appellant's duty to carry him to LaGro, the place of his destination, before putting him off the train. Yet if the court's construction of said section 28 of the statute, as contained in the instruction above quoted, were the correct one, the necessary consequence would be that all railroad companies in this state could be compelled to carry all their passengers *gratis* to the next "usual stopping place."

It is claimed by the appellee in this case, and it was so testified by him as a witness on the trial, that he had never heard before that an extra charge was made for fare when paid on the train. It is difficult to reconcile and harmonize the appellee's evidence in this regard, with the first two paragraphs of his complaint and his evidence in support of said paragraphs. For, in those paragraphs he claimed, and his evidence tended to sustain such claim, that, within one week prior to this attempted trip from Antioch to LaGro, the appellant's conductor, on two different occasions or trips, extorted from him on the train ten cents on each trip more than the usual or customary fare. It is difficult to believe that he had so recently suffered the loss of these two sums of ten cents each by

extortion, as he claimed, without having inquired into and ascertained, as he might easily have done, the probable cause or pretext for such alleged extortion. But, however, this may have been, it is not claimed or pretended, that he could not have readily ascertained, by proper inquiry, the rules and regulations of the appellant in regard to the purchase and price of tickets, and the payment of passenger fare on the train. If he did not know the appellant's rules on these subjects, he ought to have inquired of its agents, before he became a passenger on its cars. It is not claimed that he did not have an abundance of time and ample opportunities to make all proper inquiries and purchase a ticket of the appellant's agent at Antioch before he entered the cars. Having failed to purchase a ticket, or to ascertain the rules of the appellant in regard to the payment of passenger fare on the train, he was in fault; and when the conductor demanded of him ten cents more than what he supposed was the regular fare, he should have paid the money and investigated the matter afterwards. Upon his refusal to pay his fare, the conductor was fully authorized and justified, as we have already said, in putting him out of the cars and off the train, at any place not dangerous to his life or limbs.

For the reasons given, we are of opinion that the court's instruction, above set out, to the jury trying the cause, was erroneous and ought not to have been given; and on this ground, a new trial ought to have been granted.

Another cause for a new trial, assigned by the appellant, was that the damages were excessive. We have already said, that on the appellee's evidence, and under the instructions of the court, the jury could not have assessed the appellee's damages, on the first two paragraphs of his complaint, at a sum in excess of twenty cents. We are bound to conclude, therefore, that the residue of the damages, to wit, the sum of $499.80 was assessed by the jury, in appellee's favor, for and on account of the matters stated in the third paragraph of his complaint. In his evidence, the appellee gave in substance the following account of the matters, for which the jury assessed his damages in the sum last named: On a summer evening in the month of August 1873, at a point on the appellant's road between Antioch and LaGro, at the request of the conductor of a passenger train on said road, he, the appellee, having refused to pay his fare, stepped out of and off the appellant's cars. From that point he walked on the tow-path to the town of LaGro, a dis-

tance of about three and one-half miles. The appellee did not state in his evidence that the weather was unpleasant or disagreable, from any cause, or that the tow-path was in bad condition, in any way; nor did he claim that he had been injured, sickened or even fatigued by his evening walk.

We need not and will not dwell upon the question; for it seems to us, that the bare statement of this matter, as the appellee has stated it in his evidence. is convincing and conclusive proof that the damages were excessive. This cause was well assigned, and for it, we think a new trial ought to have been granted. (The remainder of the opinion was upon a point not of general interest.)

Judgment reversed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
COURT OF CHANCERY OF NEW JERSEY.[2]
SUPREME COURT OF OHIO.[3]
SUPREME COURT OF ILLINOIS.[4]
SUPREME COURT OF WISCONSIN.[5]

AGENT.

Deposit in Bank—Liability for Loss.—An agent who deposits money of his principal to his own credit in a bank, without the principal's consent, takes all the risk of such deposit: *Sargeant* v. *Downey*, 49 Wis.

ASSIGNMENT. See *Vendor and Vendee.*

BANKRUPTCY

Assumption of Firm Debt by Partner—Subsequent discharge in Bankruptcy—New promise to Co-partner to pay the Debt.—Where one of two former partners is under obligations to the other to pay a partnership debt, his discharge in bankruptcy, though obtained in pursuance of a *composition* with his creditors, including the creditor of the former firm, while it relieves him from his obligation to his former partner to pay the firm debt, does not discharge such former partner from liability for the unpaid balance of such debt; and a new promise by the bank-

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1879. The cases will probably be reported in 10 or 11 Otto.

[2] From Hon. John H. Stewart, Reporter; to appear in 32 N. J. Eq. Reports.

[3] From E. L. De Witt, Esq., Reporter; to appear in 35 Ohio St. Reports.

[4] From Hon. N. L. Freeman, Reporter; to appear in 95 Illinois Reports.

[5] From Hon. O. M. Conover, Reporter; to appear in 48 or 49 Wis. Reports.